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NO. 585444-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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TANYA GREGOIRE, as guardian *ad litem* for BRIANNA ALEXANDRA GREGOIRE, and as PERSONAL REPRESENTATIVE FOR THE ESTATE OF EDWARD ALBERT GREGOIRE,

Appellant,

v.

CITY OF OAK HARBOR, a Municipal Corporation,

Respondent.

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# BRIEF OF RESPONDENT CITY OF OAK HARBOR

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## I. INTRODUCTION[1]

The law in Washington is clear that when a custodial "special relationship" creates a duty between a jail and an inmate, issues of contributory fault and proximate cause are appropriate considerations for a jury when a inmate suffers injury. The trial court properly instructed the jury in this wrongful death case.

The trial court carefully considered appellant's objections to perceived juror bias and/or misconduct and ruled on tenable grounds that no inappropriate bias had been demonstrated or misconduct committed. These well-reasoned decisions were within the trial court's discretion and should not be disturbed on appeal.

Appellant's constitutional claims were properly dismissed on summary judgment because no private cause of action exists for appellant's alleged state constitutional violations and the federal constitutional violations were previously dismissed on summary judgment in federal court and were subject to *res judicata* and collateral estoppel.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly instruct the jury with respect to

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[1] As an initial procedural matter, it appears that the Clerk's Papers submitted by appellant do not contain the Notice of Appeal as required by RAP 9.6(b)(1)(A). Thus, it is not clear whether the notice was properly filed with the court. Respondents request that a conformed copy of the Notice of Appeal supplement the Clerk's Papers per RAP 9.6(a).

contributory fault, assumption of the risk, and proximate cause as factors to consider in deliberating liability in this jail suicide case (appellant's Assignments of Error A-D, I)?

2. Did the trial court properly retain Prospective Juror No. 12 during voir dire when she clearly indicated the ability to maintain an open mind and deliberate impartially (appellant's Assignments of Error E)?

3. Did the trial court properly retain Juror No. 5 when the court concluded that information on his website "blog" was not inconsistent with information provided in his juror questionnaire, his "blog" content did not indicate bias, he did not engage in misconduct and there was no indication he was not a fair and impartial juror (appellant's Assignments of Error F)?

4. Did the trail court properly dismiss appellant's constitutional claims on summary judgment when there is no private cause of action for state constitutional claims and the federal claims were barred by *res judicata* and collateral estoppel (appellant's Assignments of Error G-H)?

## III. COUNTERSTATEMENT OF THE CASE

### *A. Substantive Facts*

Appellant has not included any trial testimony as part of her record on appeal. Rather, for her factual background, she relies completely upon

testimony from the Coroner's Inquest conducted shortly after Mr. Gregoire's suicide. This was information provided to the trial court on summary judgment, but not at trial. Appellant may only rely on this testimony in her challenge to the summary judgment order, not in support of her argument regarding jury instructions, as this inquest testimony was never presented to the jury. The trial court, necessarily relied solely the actual trial testimony of the witnesses in determining appropriate jury instructions.

As a counterstatement of facts, respondent submits the factual background that was presented to the trial court on summary judgment, included in respondent's summary judgment motion at pp. 2-14 (SCP ___). However, the issues on appeal from the summary judgment ruling are limited to appellant's constitutional claims and, in this denovo review on appeal, involve pure questions of law. Specifically, there is no cause of action for appellant's state constitutional claims and the federal constitutional claims were previously dismissed by Judge Lasnick in federal court and were subject to dismissal in this state court action on grounds of *res judicata* and collateral estoppel.

***B. Procedural Background***

Appellant filed their original action in the U.S. District Court for the Western District of Washington, asserting three civil rights claims

under 42 U.S.C. § 1983, as well as a state law claim of wrongful death, against the City of Oak Harbor and various individual defendants. Appellant's state law claim was set forth in her Complaint, which stated: "The acts and omissions of the defendants constituted the tort of negligence, causing the wrongful death of Edward Gregoire, the biological father of appellant Brianna Gregoire, and are actionable under RCW 4.20.010." (SCP _____, Appellant's Federal Court Complaint, p. 15, ¶ 2.36)[2]

In his order of October 5, 2001, Judge Lasnick dismissed all of the appellant's federal claims under 42 U.S.C. § 1983, but declined to dismiss the remaining state law claims, holding that the parties had not substantively addressed the issue of the exercise of supplemental jurisdiction. (CP 601-613) The Court subsequently declined to exercise supplemental jurisdiction over the state law claim in its order of May 6, 2002, in which the Court reiterated the dismissal with prejudice of all § 1983 claims, dismissed the negligence claims against defendants Nelson and Wernecke with prejudice, and dismissed the negligence claims against the remaining defendants without prejudice, so as to allow them to be heard in state court. (CP 597-600)

[2] Appellant's federal court complaint was made part of the record as Exhibit B to the Declaration of Robert L. Christie in Support of Defendant's Motion for Summary Judgment, submitted on appeal with respondent's Supplemental Clerk's Papers.

Appellant filed her Complaint in the instant case on May 30, 2002, asserting claims of negligence, denial of rights under the Washington State Constitution, and Civil Rights violations. (CP 1528-1536) On April 10, 2003 Judge Alan Hancock dismissed on summary judgment all of appellant's federal and state civil rights claims. (CP 614-615) On June 12, 2003, Judge Hancock issued a letter decision denying respondent's motion for summary judgment with respect to appellant's negligence claims. (CP 590-596)

This matter was tried to a jury in Island County Superior Court before Judge Hancock between May 16 and May 31, 2006. The jury returned a special verdict (appended to appellant's opening brief), finding respondent negligent (Question 1), but finding that this negligence was not a proximate cause of Mr. Gregoire's death (Question 2). (CP 21-23)

## IV. ARGUMENT

Notably, appellant has not included any trial testimony as part of her record on appeal. Thus, there is no record of what evidence was presented to the jury and upon which the trial court relied in determining appropriate jury instructions. Accordingly, appellant cannot argue that the trial testimony established some evidentiary background that would take factual questions out of the province of the jury in assigning error. Without this foundation, appellant's assignments of error regarding jury

instructions lack substance, as well as legal support, as discussed below.

Appellant does include in the record testimony from the Coroner's Inquest conducted shortly after Mr. Gregoire's suicide. This was information provided to the trial court on summary judgment, but not at trial. Appellant may only rely on this testimony in her challenge to summary judgment, not in support of her argument regarding jury instructions.

### *A. The Court Properly Instructed the Jury on Comparative Fault and Assumption of the Risk.*

Appellant correctly sets forth the standard that jury instructions are sufficient if "they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92 (1995). The court reviews a challenged jury instruction *de novo*, within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743 (2006). Where the record shows that the party challenging the instructions was not prejudiced, no error has occurred. *Id* at 745.

Appellant argues that it was error on the part of the trial court to give instructions on comparative fault and assumption of the risk because she contends that these defenses are not available when a custodial

"special relationship" exists. Appellant states in her moving brief "[t]he trial court denied the applicability of "special relationship" in its ruling on summary judgment, as to appellants [sic] motions in limine and jury instructions." (Appellant's brief at p. 17) However, appellant's argument completely ignores the well-established law holding that principles of comparative fault, assumption of risk and other defenses apply and must be considered by a jury when a "special relationship" exists.[3]

When a "special relationship" exists defenses such as contributory fault, assumption of the risk and intervening cause are available to reduce or eliminate liability for harm suffered by one who is in the custody of another.[4] That is so both with harms inflicted by a third party as well as self-inflicted harm (such as suicide). The issue turns on the question of foreseeability, an issue that is squarely in the province of the jury. In *Hunt v. King County*[5], a case in which a mental hospital patient jumped from a

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[3] Appellant places mistaken reliance on *Christensen v. Royal School District*, 156 Wn.2d 62 (2005). *Christensen*, discussed *infra*, held that in the narrow and circumscribed facts of that case plaintiff could not be assigned contributory fault as a matter of law. Judge Hancock properly concluded that the holding had no application to the very different facts of this case.

[4] Washington courts have repeatedly apportioned damages based on the contributory fault of plaintiffs in protective special relationships with defendants. *See Yurkovich v. Rose,* 68 Wash.App. 643, (1993) (13-year-old girl assessed with contributory fault in an action against a school district alleging negligence by a bus driver); *Pearce v. Motel 6, Inc.,* 28 Wash.App. 474, 480, (1981) (finding that a jury could have considered evidence of the care and attention exercised by a motel guest for her own safety in a negligence action against the motel).

[5] 4 Wn.App. 14 (Div. I, 1971).

fifth story window, the court stated:

> Defendant pleaded and assumed the burden of proving that the plaintiff's son was guilty of contributory negligence, including volitional action. It is true that contributory negligence may consist of the 'failure to discover or appreciate a risk which would be apparent to a reasonable man, or an inadvertent mistake in dealing with it ***' It is also true that contributory negligence may be 'an intentional exposure to a danger of which the plaintiff is aware.' W. Prosser, Torts, § 64, at 434 (3rd Ed. 1964).
>
> To the extent that contributory negligence may be said to be a defense, it is prerequisite to a defense of contributory negligence in a hospital-patient case that the patient be capable of exercising the care of a reasonable man, i.e., able to appreciate the risk of harm and able to act reasonably on the basis thereof. (Citations omitted.) Under the evidence here, the issue of foreseeability of self-inflicted harm which defines the scope of the duty (citation omitted) and the issue of the patient's capacity to exercise reasonable care, i.e., capacity to be contributorily negligent, were questions for the jury. (Citation omitted.)

*Id.*, at 25-26.[6]

Appellant's argument that where there is a "special relationship" the defense of contributory fault does not apply is clearly inconsistent with well-established Washington state law, and the trial court appropriately instructed the jury in this regard.

Appellant's reliance on *Christensen v. Royal School Dist.*[7] is

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[6] The Washington State Supreme Court recognized in *Niece v. Elmview Group Home*, 131 Wn.2d 39 (1997), that the foreseeability of the harm to a plaintiff in a special relationship is a question of fact for the jury. *Id.*, at 51, fn. 10.

[7] 156 Wn.2d 62 (2005).

misplaced. There, a middle school student and her parents asserted liability against a school district arising from a teacher's sexual relationship with the student. The U.S. District Court for the Eastern District of Washington certified the following question to the court: "May a 13-year old victim of sexual abuse by her teacher on school premises, who brings a negligence action against the School District and her principal for failure to supervise or for negligent hiring of the teacher, have contributory fault assessed against her under the Washington Tort Reform Act for her participation in the relationship?" *Id*, at 64. The court, treating this as an issue of first impression, held as follows:

> We answer "no" to the question, concluding that, as a matter of law, a child under the age of 16 may not have contributory fault assessed against her for her participation in a relationship such as that posed in the question. This is because she lacks the capacity to consent and is under no legal duty to protect herself from the sexual abuse.

*Id.*, at 64-65.

The Supreme Court focused on the strong policy considerations behind the criminal laws prohibiting sexual relations with children and on the School District's enhanced duty to protect minors in its care.[8] The

[8] "We conclude that, as a matter of public policy, contributory fault does not apply in circumstances such as those described in the Certification Order. Our conclusion is compelled by two principal

court's holding that contributory fault may not be assessed in that case was limited to the specific facts and policy considerations identified in the opinion, none of which are present here. *Id.*, at 71-72.

Judge Hancock considered a motion brought by appellant specifically on the issue of whether contributory fault should be considered in light of the *Christensen* decision. (Excerpt of the Verbatim Report of Proceedings (Plaintiff's Motion Re Contributory Fault) 3-9; CP 1-8.) The court also considered significant argument on this issue, specifically with respect to jury instructions. RP 289-295. Thus, it was only after giving thorough consideration to the appellant's position that the trial court determined what jury instructions were appropriate. The court's instructions properly stated the law in Washington.

Likewise, the court properly instructed the jury with respect to assumption of risk. WPI 13.03, instructing on implied primary assumption of risk, applies to those situations in which a person, by voluntarily choosing to encounter a known peril, impliedly consents to

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reasons. First, we are satisfied that the societal interest embodied in the criminal laws protecting children from sexual abuse should apply equally to the civil arena when a child seeks to obtain redress for harm caused to the child by an adult perpetrator of sexual abuse or a third party in a position to control the conduct of the perpetrator. Second, the idea that a student has a duty to protect herself from sexual abuse at school by a teacher conflicts with the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care." *Id*, at 64.

relieve the defendant of the duty to reasonably protect against that peril. (Comment to WPI 13.03, 6 Washington Practice at 160, 5th ed. 2005)(referencing Prosser and Keeton on Torts, Sec. 68 (5th ed. 1984)). *Egan v. Cauble*[9], cited by appellant, supports the application of an instruction on assumption of risk. *Egan* states that the factors of knowledge and voluntariness, which apply to assumption of risk, are questions of fact for the jury, except when reasonable minds could not differ. *Id.*, at 378. Appellants never raised the issue concerning assumption of risk on summary judgment. As no trial testimony has been made a part of the record by appellants, there is no evidence in the record to support a contention that reasonable minds could not differ on those facts in this case and that Judge Hancock erred in giving WPI 13.03.

The trial court relied on the comments to WPI 13.03, as well as the definition of fault under RCW 4.22.015 in reaching the correct conclusion that an instruction on assumption of the risk should be given. (RP 304:2-305:21) The definition of fault under RCW 4.22.015 includes "unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages." RCW 4.22.015. The statute goes on to state that "legal requirements of causal relation apply both to fault as the

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[9] 92 Wn.App. 372 (Div. II, 1998).

basis for liability and to contributory fault." *Id.*

To accept appellant's arguments, a duty arising in the context of a "special relationship" would become one of strict liability, making a jail a guarantor of prisoners' safety. Neither Washington case law nor the Legislature has seen fit to take this step. Accordingly, the instructions to the jury were a correct statement of the law.

### *B. The Trial Court's Instructions on Proximate Cause Were Appropriate.*

Where a defendant cannot reasonably foresee the injured party's conduct causing self-inflicted injury, then that conduct has legal effect either because the injured party has a duty to take reasonable care to protect himself from injury, or because that conduct is the proximate cause of those injuries. *Hunt*, at 23. Appellant contends that the court should have included WPI 15.02, applying the "substantial factor" test to proximate cause. Instead, the trial court gave WPI 15.01, the standard proximate cause instruction, and subsequently WPI 15.01.01, when the jury asked for a clearer definition of "proximate cause." RP 329-334. Appellant's proposed jury instructions included both WPI 15.01.01 as well as 15.02. (RP 330:20-24) The Court rejected WPI 15.02 under the circumstances of this case. *Id.*

WPI 15.02, the instruction applying the "substantial factor test," is

limited to use in the narrow class of cases in which the "but for" test of WPI 15.01 is inapplicable. 6 Washington Practice at 187, 5th Ed. (2005). The "substantial factor test" may be appropriate in three types of cases:

> First, the test is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the "but for" test. Second, the test is used where a similar, but not identical, result would have followed without the defendant's act. Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.

*Id.* (citing *Daugert v. Pappas*, 104 Wn.2d 254, 262 (1985)). There is no record presented here suggesting that this case falls into any of these categories.

Applying the "substantial factor" test to determine cause in fact is normally justified only when a plaintiff is unable to show that one event alone was the cause of the injury. *Daugert* at 262. In *Daugert*, the Washington Supreme Court limited the application of the test to cases "only where the defendant's negligence caused a 'separate and distinguishable harm.' *Id* at 261.[10] WPI 15.02 is not applicable to this

[10] The comment to WPI 15.02 goes on to indicate that the substantial factor test has been adopted by Washington courts in cases such as those involving discrimination or unfair employment practices, to determine the status of "seller" under the Securities Act of Washington, in multi-supplier asbestos-injury cases where it is not possible to determine which of many exposures caused injury, and in *Herskovitz v. Group Health Coop*, 99 Wn.2d 609 (1983), where the lead opinion of two justices apply the substantial factor test in a medical malpractice case in which it was claimed that a misdiagnosis reduced the

case, where there is one injury, Mr. Gregoire's death, resulting from one cause, asphyxiation by hanging. Rather, WPI 15.01 is appropriate, even where there are multiple potential proximate causes as alleged in this case. WPI 15.01 includes the optional final paragraph "there may be more than one proximate cause of an injury/event," this language being included in Jury Instruction No. 17. (CP 43.) The jury was further instructed regarding each alternative theory of proximate cause asserted by the appellant and the respondent with Jury Instruction No. 6. (CP 32.) Finally, the question on the verdict form pertaining to proximate cause spoke in terms of whether "the City of Oak Harbor's negligence [was] **a** proximate cause of the death of Edward Gregoire." (Question 2, Appendix at 21; emphasis added)

Nothing in these instructions prevented appellant from arguing her specific theories to the jury or prevented the jury from determining that the respondent was negligent or that such negligence was a proximate cause of the decedent's death. Indeed, appellant argued to the jury that there were multiple ways in which the City was negligent, ranging from the failure to screen Mr. Gregoire on intake to the failure to administer CPR when he was found hanging in his jail cell. While none of that record has

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decedent's chance of survival from 39% to 25% but the plurality opinion of four concurring justices applied the traditional "but for" test. *Id.*, at 187-189.

been made part of this appeal, appellant was apparently sufficiently convincing that the jury agreed that the City was negligent in one or more of the ways argued at trial. However, the jury was also convinced the City's negligence in whatever manner it determined was not a proximate cause of Mr. Gregoire's death. Judge Hancock's instructions on this issue were proper statements of law, coming directly from the WPI. Further, the language in the instruction gave appellant all she needed to argue her theories of liability. There was no error in the proximate cause instructions given to the jury.

In the instant case, appellant contented that there was more than one proximate cause of Mr. Gregoire's death; in particular, despite the fact that Mr. Gregoire hung himself, respondent's negligence caused or contributed to his death. However, among these alleged multiple causes, the jury could distinguish and determine what they believed proximately caused Mr. Gregoire's damages. To this end, the jury was given Instruction No. 7 regarding reduced or lost chance of survival resulting from the alleged negligence on the part of respondent for failing to initiate CPR. (CP 33)

A party is not entitled to any particular phraseology or "to put his argument into the court's instructions." *Shea v. Spokane*, 17 Wn.App. 236, 245 (Div. III, 1977) (citations omitted). All that is required is that the

instructions adequately and correctly state the law and are sufficient to allow a party to argue its specific theories to the jury. *Id.*, at 246 (citations omitted). Here, appellant was able to make her arguments, and the jury certainly could have found that respondent's negligence was a proximate cause of Mr. Gregoire's death and apportion some percentage of fault against the City. Contrary to appellant's contention, simply because the jury found no proximate cause does not mean they could not have found otherwise given the instructions. It was entirely within the function and ability of the jury to determine what, if any, damages would have resulted had Mr. Gregoire not initiated the hanging, and conversely, whether respondent's alleged negligence was a proximate cause of Mr. Gregoire's damages.

The jury instructions, when read in their entirety, not only reflect a proper statement of applicable law, but also allowed the jury to find that respondent's negligence was a proximate cause of injury and apportion damages accordingly. Thus, not only were the instruction appropriate, but appellant was in no way prejudiced by the jury instructions as given.

### *C. The Trial Court Did Not Abuse its Discretion in Keeping Juror No. 12 and Juror No. 5 on the Panel.*

Appellant has not set forth the applicable standard of review for alleged jury bias. A court's decision regarding juror bias is reviewed for a

clear abuse of discretion or an erroneous interpretation of the law. *Dalton v. State*, 115 Wn.App. 703, 713 (Div. III, 2003). "In cases that involve a juror's alleged concealment of bias, the test is whether the movant can demonstrate that information a juror failed to disclose in voir dire was material, and also that a truthful disclosure would have provided a basis for a challenge for cause." *Id.* (citation omitted).

> The right to trial by a jury assumes the right to an unbiased and unprejudiced jury. . . . If one or more members of the jury panel are biased or prejudiced, the constitutional right to trial by jury is denied. . . . But a [party] assigning error to the court's denial of a challenge for cause must show more than the mere possibility that the juror was prejudiced. . .. And therefore, unless it is very clear, the court's denial of a challenge for cause must be sustained.

*State v. Stackhouse*, 90 Wn.App. 344, 350 (Div. III, 1998) (citations omitted)

1. Prospective Juror No. 12 Did Not State Bias Subjecting Her to Removal for Cause.

With respect to equivocal answers by prospective jurors, the standard of review is set forth in *State v. Rupe*, 108 Wn.2d 734, 749 (1987), cert. denied, 486 U.S. 1061 (1988):

> Equivocal answers alone do not, however, require that a juror be removed when challenged for cause. The question is whether a juror with preconceived ideas can set them aside. The trial judge is best situated to determine a juror's competency to serve impartially. The trial judge is able to observe the juror's demeanor and in light of that observation, to interpret and evaluate the juror's answers to

determine whether the juror would be fair and impartial.

*Id.*

Appellant asserts that Prospective Juror No. 30 was dismissed for cause on the same grounds appellant asserts prospective Juror No. 12 was allowed to remain on the jury. However, there are key distinctions in the statements made by each prospective juror. (RP 239-241.) For example, prospective Juror No. 30 responded to appellant's counsel, "I think you don't want me" when asked whether she would potentially be a fair juror given her strong feelings regarding self-responsibility and suicide. Furthermore, while prospective Juror No. 12 indicated her pre-disposition to side with the respondent, she indicated that she had "an open mind about everything" (RP 242:8-9) and that she could definitely be fair to both sides of the case (RP 243:15-23).

The court, having heard prospective Juror No. 12's position, fairly weighed her statements and determined that cause to challenge prospective Juror No. 12 was not established (RP 252:18-253:22).

Appellant also assigns error based on the contention that the court restricted counsel's further inquiry of prospective Juror No. 12. (Appellant's Brief at p. 31.) However, this argument lacks factual merit. The record clearly indicates that appellant's counsel was able to question prospective Juror No. 12 without restraint (RP 240:25-243:4). Appellant's

counsel was also entitled significant opportunity to make arguments to the court regarding prospective Juror No. 12 (RP 250:7-23; RP 255:1-10). Contrary to appellant's assertion, it was argument from respondent's counsel that the trial court deemed unnecessary with respect to prospective Juror No. 12 (RP 252:10-12).

Thus, given Judge Hancock's careful consideration of prospective Juror No. 12's position, there can be no determination that the court abused its discretion in concluding that prospective this individual could be fair and impartial.

2. The Trial Court Correctly Took No Action Regarding Alleged Bias and Misconduct by Juror No. 5.

With respect to Juror No. 5, Judge Hancock took an equally careful approach in determining that no juror misconduct occurred and that dismissal or further inquiry was unnecessary.

Appellant contends that Juror No. 5 failed to respond properly to questions in the jury questionnaire, as well as during voir dire regarding his feelings about suicide. Appellant contends that by doing so, Juror No. 5 inappropriately concealed a bias. (Appellant's Brief, p. 32; RP 335:25-9; RP 340:10-341:8.) Appellant felt that Juror No. 5's activities as a youth minister were inconsistent with his answers on the jury questionnaire and during voir dire. *Id.* Whether an allegation of juror bias requires a new

trial is left to the discretion of the trial court. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 155 (1989). Appellate review is for abuse of that discretion. *Id.*, at 158. Discretion is abused if the court's decision does not rest on tenable grounds or tenable reasons. *Micro Enhancement International, Inc. v. Coopers & Lybrand*, 110 Wn.App. 412, 430 (Div. III, 2002).

RCW 2.36.110 states:

> It shall be the duty of the judge to excuse from further jury service any juror, who **in the opinion of the judge**, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service. [emphasis added]

The determination of whether or not to dismiss a juror ought to be at the discretion of the trial judge. *State v. Elmore*, 155 Wn.2d 758, 768 (2005). "Washington courts, as well as the great majority of other courts reviewing juror dismissal, have applied an abuse of discretion standard and found that so long as the trial court has applied the proper legal standard of proof to the evidence, the trial court's decision deserves deference." *Id.*, at 768-69.

Appellant does not assign error to the standard of proof the trial court applied in reviewing the alleged impropriety of Juror No. 5. After review of appellant's "evidence," the Judge Hancock determined that there

was no apparent bias or impropriety on the part of Juror No. 5. (RP 342:6-347:7.) His determination included the findings that there was nothing in the information provided to indicate that Juror No. 5 was untruthful in answering the jury questionnaire or otherwise inappropriately discussed the case in some manner contrary to the court's instructions in his "blog." Judge Hancock also found that his earlier "blog" entries, which indicated some prior experience with suicide and/or death, did not demonstrate evidence of bias or prejudice. *Id.* The trial court also noted that both parties had every opportunity to question Juror No. 5 relating to suicide during voir dire. *Id.* Clearly, the trial court's decisions regarding this subject were based on tenable grounds. The appellant's assignments of error in this regard are misplaced.

### *D. Appellant's Constitutional Claims Were Properly Dismissed on Summary Judgment.*

#### 1. The Court Properly Dismissed Appellant's State Constitutional Claims.

The trial court properly dismissed the state constitutional claims as a matter of law on the grounds that there is no private right of action for alleged violations of the Washington State Constitution. Several cases have addressed the issue of alleged violations of the rights enumerated in

Article I of this state's Constitution.[11]

For example, in a case in which the plaintiffs asserted that Pierce County had violated their right of privacy under §7, and conceded that no cause of action existed, they requested that the court create a private right of action. *Reid v. Pierce County*, 136 Wn.2d 195 (1998). The court declined to do so, holding that the common law provided sufficient redress. *Id.* Similarly, the court in *Systems Amusement, Inc. v. State*, 7 Wn.App. 516 (1972), rejected the argument that Article I, § 3 created a private cause of action for alleged violation of the constitutional right of due process, which is also at issue in the case at bar. *Systems Amusement*, 7 Wn.App. at 517. In fact, "Washington courts have consistently rejected invitations to establish a cause of action for damages based upon constitutional violations 'without the aid of augmentative legislation.'" *Blinka v. Washington State Bar Association*, 109 Wn.App. 575 (2001) (*quoting Systems Amusement v. State*, 7 Wn.App. 516, 517 (1972); *citing Spurrell v. Bloch*, 40 Wn.App. 854, 860-61 (1985); *Reid v. Pierce County*, 136 Wn.2d 195 (1998)).[12]

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[11] This issue was among those comprehensively briefed to the trial court in defendant/respondent's motion for summary judgment (SCP 1-25). plaintiff/Appellant's response to that motion (CP 1497-1521), and defendant/respondent's reply (SCP 26-30).

[12] The *Blinka* Court went on to say:

Here, appellant has asserted claims for violations of Article I, §§ 3, 10 and 14 of the Washington Constitution. None of these claims can survive summary judgment, as no private right of action exists with respect to any of these claims. Appellant failed to point to any "augmentative legislation" that would create such a right of action. *Darrin v. Gould*, 85 Wn.2d 859 (1985), the case cited by appellant, does not support her claim. The constitutional violation at issue in *Darrin*, sex discrimination, is expressly prohibited by statute at RCW 49.60, et. seq. Thus in *Darrin*, the alleged constitutional violation was supported by the requisite "augmentative legislation".

Because the Washington State Constitution does not give rise to a cause of action for damages where the right enumerated in Article I have

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"In *Hunter v. City of Eugene*, 309 Or. 298, 787 P.2d 881, 884 (1990), the Oregon Supreme Court entertained an appeal to recognize a constitutional tort:

> Lacking legislative guidance, this court is in a poor position to say what should or should not be compensation for violation of a state constitutional right and what limitations on liability should be imposed.... State constitutional history and the subsequent jurisprudential history of no implied causes of action for damages for constitutional violations plainly leave us without any guidance.

The same reasoning has direct applicability to this case. In light of the lack of legislative guidance on this issue, and considering Washington courts' consistent refusals to recognize a cause of action in tort for constitutional violations, we uphold the dismissal of Blinka's constitutional tort claim in this case." *Blinka* at 591.

allegedly been violated, all claims arising out of these claimed violations were properly dismissed with prejudice.

2. The Court Properly Dismissed Appellant's Federal Constitutional Claims.

Appellant asserts that "Mr. Gregoire was denied civil rights due to his race." (CP 1528-1536, at ¶ 3.4) As stated in the Procedural Background above, the District Court dismissed all Civil Rights claims with prejudice on their merits, such that appellant is barred by the doctrines of *res judicata* and collateral estoppel from relitigating those issues here. (CP 601-613)

*Res judicata* and collateral estoppel prevent the relitigation of claims or issues between identical parties and their privies. *In Re Metcalf*, 92 Wn.App. 165, 173-74 (1998) (*citing Bradley v. State*, 73 Wn.2d 914, 916 (1968). To prove *res judicata*, the moving party must show concurrence of identity between two actions in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Id.* (*citing U.S. Bank v. Hursey*, 116 Wn.2d 522, 529 (1991)). Collateral estoppel is similar to *res judicata*, applying to issues instead of claims. Collateral estoppel has four requirements: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against

whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice. *Id.* (*citing State v. Williams*, 132 Wn.2d 248 (1997)).

Here, the appellant asserted Civil Rights claims in her initial Complaint, which she filed in the U.S. District Court for the Western District of Washington. (SCP _____) Judge Lasnick dismissed all federal claims in his order of October 5, 2001, holding that the defendants did not violate Mr. Gregoire's constitutional rights. (CP 601-613) Appellant then filed the instant lawsuit, realleging, among other things, her Civil Rights claims. (CP 1528-1536, at ¶ 3.4) However, the subject matter of appellant's state court complaint is identical to that in her federal court complaint, as both arose out of the death of her husband while in the custody of the City. The cause of action is identical, i.e., appellant is alleging the identical Civil Rights claim. The same plaintiff/appellant, namely Tanya Gregoire in all her capacities, is asserting that claim against all but two of the same defendants. As such, all elements of *res judicata* are satisfied, such that the doctrine of *res judicata* must bar the relitigation of appellant's Civil Rights claims in this Court.

Similarly, the issue decided in the prior adjudication is identical with the one presented here; the District Court dismissed the Civil Rights

claim on the merits; the parties are identical; and no injustice will result if appellant is not permitted to relitigate the identical claims already litigated and dismissed on summary judgment. Appellant did not appeal Judge Lasnik's decision and she cannot subsequently seek to revive these claims by appeal in this case. As such, this claim must also be barred by the doctrine of collateral estoppel.

The trial court properly dismissed appellant's constitutional claims on summary judgment and, accordingly, the trial court decision should be affirmed.

## V. CONCLUSION

The trial court properly instructed the jury with respect to contributory fault, assumption of the risk, and proximate cause as factors to consider in deliberating liability in this jail suicide case. The instructions were a proper statement of the law, allowed the parties to make their respective arguments, and did not prejudice appellant.

The trial court did not err when it declined to dismiss Prospective Juror No. 12 for cause during voir dire because she clearly indicated an ability to maintain an open mind and deliberate impartially.

The trial court did not err when it concluded that information on Juror No. 5's website "blog" was consistent with his juror questionnaire, his "blog" content did not indicate bias, he did not engage in misconduct,

and there was no indication he was not a fair and impartial juror.

The trial court properly dismissed appellant's constitutional claims on summary judgment because there is no private cause of action for state constitutional claims and the federal claims were barred by *res judicata* and collateral estoppel.

For each of these reasons the decisions of the jury and the trial court should not be disturbed on appeal. Respondent requests that appellant's request for remand, a new trial and attorney's fees[13] be denied.

Respectfully submitted this 12th day of April, 2007.

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[13] Appellant provides no argument or authority supporting her request for attorneys' fees. Rather, it is presented pro forma, almost as an aside, in the last sentence of her brief. Of course, there is no basis for this request since attorneys' fees are not awardable in a negligence case.